BEFORE THE UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

STANDARD PARKING, IMPERIAL PARKING, AMPCO SYSTEM PARKING d/b/a ABM PARKING SERVICES, LAZ PARKING, INTERPARK,
Individually and on behalf of
CHICAGO PARKING ASSOCIATION

And,

TEAMSTERS LOCAL NO. 727

Case No. 13-CA-71259

CHARGING PARTY TEAMSTERS LOCAL UNION NO. 727'S REPLY BRIEF IN RESPONSE TO RESPONDENTS' OPPOSITION TO THE CHARGING PARTY'S AND COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS

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Charging Party Teamsters Local Union No. 727 ("the Union"), pursuant to Section 102.46 of the Board's Rules and Regulations, respectfully submits the following brief in reply to Respondents' Opposition to the Charging Party's ("Union")and Counsel for the General Counsel's (the "General Counsel") Exceptions to the Decision of the Administrative Law Judge ("ALJ") Geoffrey Carter issued on October 25, 2013.[1]

INTRODUCTION

This is a case of a nothing more than a group of Employer's laziness during contract negotiations which resulted in the denial of wage increases to thousands of hardworking employees. Such behavior cannot be overlooked and should not be rewarded by the Board here. In the instant case, the Respondents, represented by legal counsel, negotiated, bargained, and ultimately accepted the October 28, 2011 terms for the 2011-2016 Collective Bargaining Agreement ("CBA"). Ridden with remorse for its laziness and failure to review the CBA before accepting it, Respondents have refused to execute the CBA. In an attempt to distract the Board from its own laziness, Respondents' attempt to create a complex legal ambiguity which simply does not exist here. Respondents' brief is entirely unsupported by the Record and Board law. Accordingly, the Union's and Counsel for the General Counsel's Exceptions should be sustained with the requested relief ordered in full.[2]

ARGUMENT

I. The ALJ Erred In Finding That Respondents Did Not Violate Sections 8(A)(5) And 8(A)(1) Of The Act When They Refused To Execute The October 28 Contract. ALJD at 26; U. Br. 25-30.

[1] Citations herein will be cited as follows: ALJ's decision and order will be cited as "ALJD"; the Respondent's Brief in Opposition to the Charging Party's Exceptions will be cited as "R.Br."; the Union's Exceptions and supporting brief will be cited as "Un. Br."; the official transcript will be cited as "Tr."; exhibits of the General Counsel will be cited as "GC Ex."; and exhibits of the Respondents will be cited as "R.Ex."

[2]The Union hereby reincorporates any and all arguments and facts stated in the Union's Exceptions and Supporting brief.

Current Board law holds, "an employer violates Section 8(a)(5) of the Act by refusing to execute a written contract incorporating the terms of a collective-bargaining agreement reached with a union representing its employees." *Hillard Dev. Corp.*, 345 NLRB 581, 583 (2005) *citing H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 525-526 (1941); *Induction Services*, 292 NLRB 863 (1989).[3]Despite Respondents' arguments to the contrary, which will be fully addressed below, the Record reveals that: 1) the parties reached a **tentative** agreement on October 14 on the last day of in-person negotiations; 2) **bargaining continued** after the tentative agreement, resulting in the prior tentative agreement being clarified by both the CPA's and the Union's offers/counteroffers (see Un. Br. Addendum A); 3) Respondents were presented with CBA proposals containing identical unambiguous wage scales for review prior to acceptance (see attached Un. Br. Addendum A); 4) on October 28, 2011 at 1:40 p.m., the CPA, after receiving the full CBA complete with wage scales, accepted the terms and a contract was formed; and 5) Respondents have refused, both verbally and in writing, to execute the October 28 agreement. ALJD 12-13, 18, 24-27. Br. at 16; GC Ex. 11,16,17,21,23,26, 27.

Although Respondents spent countless pages refuting the Union's arguments related to other conclusions of law, the Respondents failed to refute the above case law or its application here further proving its import. Applying the above holding to the facts outlined, it is clear that the ALJ erred in not finding a violation of 8(a)(5) and (1) here, and the Union's exceptions should therefore be sustained and the requested relief awarded.

A. The ALJ Erred in Concluding That the Parties Reached An Agreement on October 13-14. ALJD 24-27; U. Br. 25-30.

The ALJ's conclusion of law that the contract was formed on October 13 or 14 is wholly inconsistent with the ALJ findings of fact and Record Evidence. Un Br. 25-27. Specifically, the

[3] Respondents brief does not address these case holdings or their application here, making the Union's argument uncontested by the parties.

ALJ found that after October 14, the parties were, "complet[ing] [their] review" of the contract, "propos[ing] changes to Sections," making "revision[s]" and incorporating other "minor changes." ALJD at pp. 12-13, 24-27. Proposing changes, reviewing proposals, making revisions, accepting and "incorporate[ing]...agreed changes" are the quintessential components that characterize bargaining.[4] In fact, Respondents brief describes nearly identical behavior exhibited by the parties on October 12 and 13 (prior to the tentative agreement) that was undisputedly deemed bargaining by both parties. R. Br. 18. Logic dictates that if the behavior on October 12/13 (as described by Respondents and ruled by the ALJ) was bargaining, then the same behavior occurring after October 14 would also be bargaining. More importantly, Board law holds that the parties' words, as found in the Record, have the legal effect of bargaining (i.e. turning acceptance into a rejection and counteroffer). *Herman Bros*, 273 NLRB 124 (1984); *Northern Petroleum Equip Corp*, 244 NLRB 685 at 686-687 (1979). Specifically, "An acceptance of [a].... Counteroffer must be clear and unambiguous. It cannot vary, add to, or qualify the terms of the offer; if it does, it constitutes a rejection of the offer." *Id.* at 125 *citing* 1 Williston, Contracts Secs 72-73 (3d ed. 1957 & Supp. 1983). Here, upon receiving the final offer by the Union, the CPA "proposed changes to Sections" and in fact "added to" and "qualified the terms of the [Union] offer". See Un. Br. Addendum A; GC Ex. 16, 17, 21.[5] Therefore, by finding that the CPA did in fact make changes to the Union's offer, the ALJ should have similarly concluded that the CPA's conduct, under Board law, constituted a counteroffer (a clear sign of bargaining). Had the ALJ or Respondents correctly applied this standard, they would have found that the CPA's counteroffer triggered a series of counteroffers and ultimate acceptance on

[4] Respondents did not Except to these findings by the ALJ and failed to address them in their brief.
[5] Many of these facts were not Excepted by the Respondents. See Union's Answering Brief.

October 28, 2011 since the October 28, 2011 acceptance was the only acceptance that did not "qualify" or propose "additional terms." *Id.*; GC Ex. 27, 29, 31.

Respondents do not refute the above behavior occurred, but instead attempt to dilute its behavior by renaming offers, counteroffers, and acceptances as "clarifications" and "tweaks." R. Br. at 13-14. First and foremost, renaming a counteroffer or offer a "tweak" or "clarification" does not change the legal effect of the action, and Respondents' citation to *Quebecor World Buffalo* and *Colfax* do not hold such and are entirely inapplicable here.[6] R. Br. at 29. Additionally, Respondents' own behavior confirms that they in fact believed that they were bargaining as evidenced by the letter sent to the Union "[attempting to] formally reject the wage scales from the October 28 draft" and/or withdraw their offers and/or revoke their acceptances on October 28, 2011. ALJD at pp. 15-16, 24-27. If Respondents truly believed that the offers and counteroffers were "clarifications" and "tweaks," then they would not have sent a letter "withdraw[ing] their offers or... revoke[ing] their acceptances." GC 31. Both Respondents and the ALJ fail to address this undisputed evidence which proves that Respondents and the Union were bargaining after October 13/14. Finally, Respondents' argue that the fundamental principles of contract law cited by the Union "do not control the formation of the collective bargaining

[6] The Board should note that *Quebecor World Buffalo* was reversed and remanded by the Supreme Court making the holdings cited by Respondents inapplicable. *New Process Steel v. NLRB*, 560 U.S. 674, (2010). Additionally, the facts of *Quebecor* are entirely distinguishable from the facts of the instant case. In *Quebecor*, the Union actually asked questions about the Company's final offer to which the Company responded and "clarified" its final offer which notably "**did not in any way affect the terms of the final offer**," did not change the actual language of the final offer, and was explicitly presented by the Company as clarifying language not meant to change the language of the CBA. *Quebecor*, 353 NLRB 30, 37 39 (2008) (emphasis added). Here, the alleged "clarifications" most certainly affected the terms of the final offer and changed the language of the CBA as many of the alleged "clarifications" included items that were not even addressed by the "final offer" (i.e. funeral leave, vacations, drug and alcohol, and benefits). Similar to *Quebecor*, *Colfax* is equally distinguishable. In *Colfax* the parties "signed a summary of a new collective bargaining agreement" and then later received an agreement for execution with language different than that included in the **executed summary** which the Company refused to sign. *Colfax*, 20 F.3d 750 at 750-753 (1994). Here, the parties never signed a summary agreement and, unlike the Company in *Colfax*, were sent the identical wage scales nearly eight times for acceptance before execution, not once like *Colfax*. *Id.*

agreement." This argument completely ignores the case cited by the Union which applies the very contract principles Respondents dispute. R. Br. 35-36.[7,89] In applying the fundamental principles cited by the Board in *Herman Bros*, it is clear that due to the parties' bargaining after October 14, the actual contract was not formed until October 28, 2011, and any arguments or finding of fact to the contrary would require the Board to ignore the parties' own actions and admitted behavior from October 14-October 28 in the Record. This error by the ALJ cannot stand and the Union's Exceptions should therefore be sustained.

B. The ALJ Erred In Finding That The Parties Could Not Refine Their Tentative Agreement Reached On October 13-14, 2011. ALJD 23-27. U. Br. 30-31.

The very case cited by Respondents' in its brief supports the Union's position that no contract was formed on October 14, 2011 and could therefore be refined by the parties. R. Br. 36. Respondents cite *YWCA of W. Massachusetts*, which states, "[i]n collective-bargaining...'tentative agreement' refers to an agreement that (1) has been accepted by the parties subject to ratification...or (2) is an agreement on a particular issue that is ***subject to becoming binding*** if and when the parties reach agreement on all other issue." 349 NLRB 762, 772 n.12 (2007) (emphasis added). Respondents mistakenly apply the first definition cited by the

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[7] Respondents reliance on the alleged Bargaining Update should be disregarded due to the inconsistencies and questionable testimony provided by Eric Uhlig (the authenticating witness). Un. Br. 23-25. Uhlig's inconsistencies in testimony only further demonstrate the inauthenticity of the Exhibit and therefore it should not be relied upon by the Board. Additionally, Respondents' citation to the holding that documents produced in response to a subpoena are authentic, completely ignores the issue at hand. R. Br. at 20. The Union does not dispute that this document existed, instead the Union disputes that this document was anything more than a draft which was not posted on the Union's website or viewed by Membership. Accordingly, the ALJ's reliance on the exhibit was in error.

[8] Respondents' arguments related to the Union's decision to oppose the City of Chicago congestion tax are entirely irrelevant to the issue of whether the parties reached a final agreement on October 13/14. In fact, there is no legal authority known by the Union, or cited by Respondents, which holds that opposing a City tax equates to entering into a final agreement. Therefore, Respondents undue emphasis on the Union's opposition is nothing more than an attempt to muddy the Record and factual underpinnings of this case. Accordingly, the Board should not be swayed by this misdirection.

[9] The Board should note that two of the cases cited by Respondents use the same contract principles of offer and acceptance urged by the Union here. See Farmingdale Ironworks, Inc., 249 NLRB 98, 104 (1980); Auciello Iron Works, Inc., 303 NLRB 562, 566 (1991).

Board in their brief, which was unaddressed by the ALJ's finding, yet they fail to address the second definition. ALJD 26. In turning to the second and more applicable definition, it is clear that any tentative agreement reached by the parties on October 14 would only become binding if and when the parties reached agreement on all issues. *YWCA*, 349 NLRB 762, 772 n.12 (2007). As of October 14, the parties had not reached agreement on funeral leave, vacation, benefit fund contributions, or drug/background testing. GC Ex. 21; ALJD 12-13, 24-27. It was not until after the parties reached agreement on these Articles that the tentative agreement could become binding. As the Record clearly demonstrates, the parties did not reach agreement on all other issues until October 28. *Id*; GC Ex. 25, 27A-B. Given the tentative nature of the agreement reached on October 14, the ALJ's finding that the agreement could not, and was not, refined and ultimately changed through a series of counteroffers, offers, and acceptances completely contradicts not only the undisputed facts but the very case cited by the Respondents. The Union's Exceptions should therefore be sustained.

C. The ALJ Erred In Concluding That There Was No Meeting of The Minds Between the Parties. ALJD 10-13, 25-26. U. Br. 31-34.

Assuming arguendo that the contract was formed on October 14 and subsequent ambiguity arose over the terms "scales proportionate to the prior agreement," this ambiguity was clearly resolved by the actual insertion of the "scales proportionate to the prior agreement" by the Union nearly eight times prior to the final acceptance by the CPA. GC Exs. 16-27. The Respondents claim that when the parties reached a tentative agreement, they did not realize that the scales proposed by the Union would place the new employees from the expired 2006-2011 contract into the old employees' tier in the new 2011 CBA. This argument is baffling given the clarity of the tiers in not only the Union's initial proposal but the subsequent contract drafts exchanged by the parties nearly eight times. *Id.* The cutoff dates (on or after November 1, 2011 and prior to

November 1, 2011) used for the employee tier categories makes clear on its face that employees hired prior to November 1, 2011 would fall into one tier. Logic dictates that any employee who was hired during the 2006-2011 CBA would *ipso facto* be an employee hired "prior to November 1, 2011." Not only was this language routinely used and implemented by the parties in prior contracts, dating as far back as 1996, but the language also appeared in all capital bold letters. Finally, Respondents admit in their brief that "scales proportionate to prior agreement" meant that there would be a $2.00 wage difference from new hires and old employees. R. Br. at p.2, 11; ALJD at 9. In the agreed upon contract there is in fact a $2.00 wage difference between new hires ($11.80 or $12.55) and old employees ($9.80 or $10.55).[10] Respondents' attempt to create ambiguity stands in complete ignorance of these clear facts, and their insistence on emphasizing the Union's failure to "explain" the tiers is nothing more than a failed attempt to distract the Board from the truth. Respondents had buyer's remorse after accepting the unambiguous wage scales, which does not lead to the conclusion reached by the ALJ that there was no meeting of the minds. ALJD at 10-11. Based on the admitted meaning articulated by Respondents and the scales themselves, it is clear that there is no ambiguity or that ambiguity was resolved.

Finally, longstanding Board Law holds that, "the expression 'meeting of the minds' does not literally require that both parties have identical subjective understandings on the meaning of the material terms in the contract. Rather, subjective understandings (or misunderstandings) as to the meaning of the terms which have been assented to are irrelevant, provided the terms themselves are unambiguous." *Community Options Residential Services*, 1998 NLRB LEXIS 430, 43-CA-8062 (July 2, 1998), quoting *Union Plaza Hotel & Casino*, 296 NLRB 981, 923 (1989). Respondents do not contend that the wage scales inserted in the agreement are ambiguous.

[10] The wages listed are the starting rates for residential and commercial employees.

Instead, the ambiguity upon which the Respondents' arguments stands requires reliance not on the objective and unambiguous wage scales expressed in the written documents exchanged between the parties from October 18-October 28, 2011, but on the alleged subjective misunderstandings held prior to the exchanges or documents. Respondents admit that they ignored the objective unambiguous wage scales in the contracts sent by the Union. R. Br. 25-31. This ignorance of clear terms and subsequent articulation of a separate subjective meaning (i.e. a 3rd tier) does not create an ambiguity. In fact, if anything, the scenario is only a unilateral mistake to which Union members should not fall victim. Board law holds that only in a limited amount of highly unusual circumstances, not present here, will the Board rescind a contract as the ALJ erroneously did here. *North Hills Office Services*, 2005 NLRB LEXIS 186 at 12-13, Case No. 22-CA-26250 (2005). Where one party clearly expresses his or her intent (i.e. inserts the actual scales "proportionate to the prior agreement"); and the other parties believes that intention is in error (i.e. the CPA believed that the scales were to include a 3rd tier not present in the Union's express provision), and that error is "unknown to and unsuspected by the other party" (i.e. the Union here), the party to the subsequent contract cannot then "avoid [the resulting contract] on the ground that he (i.e. the CPA) made a mistake where the other contractor [i.e. the Union] had no notice of such mistake and acts in perfect good faith." *North Hills Office Services*, 2005 NLRB LEXIS 186 at 12-13, Case No. 22-CA-26250 (2005) citing *Healthcare Workers Union, Local* 250, 341 NLRB No. 137 (2004), sl. Op. at p.6; *Apache Powder Co.*, 223 NLRB 191 (1976). Here, the Respondents' only defense to this uncontested Board law holding is that Schwartz allegedly did not review the drafts containing the alleged error or mistake and therefore could not put the Union on notice of the mistake.[11] This defense does not change the fact that the

[11] Respondents' argument that the Union's counsel somehow violated the Illinois Rules of Ethics by not putting the wage scales in redline is entirely unsupported by the clear Record Evidence. First the Rule cited by Respondents

wage scales were presented to the Respondents nearly eight times and the CPA had numerous opportunities to put the Union "on notice" of the mistake. GC Ex. 16-27. The Respondents did not notify the Union, and therefore the Union had no way of knowing that there was any alleged error or mistake. Once the Respondents accepted the full contract with wage scales, regardless of any alleged mistake, which the Union does not agree that there was, the Respondents became bound to the alleged mistake. Based on the above case law holdings, the ALJ's conclusion that there was a mutual mistake was in error, and the CPA should thus be bound the final contract reached on October 28, 2011. Accordingly, the Union's Exceptions should be sustained.

D. The ALJ Failed to Properly Apply *Windward*

Even if the Board ignored the case law citied above, it cannot ignore the application of *Windward* to the instant case. In a case identical to the instant case, the Board found an 8(a)(3) violation for refusal to execute a contract where the parties reached agreement over the specific terms of the contract and subsequently disagreed over their meaning. *Windward Teachers Assn.*, 346 NLRB 1148 at 1151 (2006).[12]

Respondents' only defense to *Windward's* application is that the contract here is ambiguous and there was a mutual mistake over the wage scales, making the instant case distinguishable from *Windward.* This defense is flawed because it fails to take into account the Board's reasoning for finding the contract unambiguous which should equally apply here. Both the ALJ and Respondents fail to address this critical point. In making its determination, the Board relied on facts identical to the instant case and found not only that the contract was unambiguous but

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does not require that every change appear in redline. Instead, the Rule requires that, "changes from prior drafts will be identified in the draft *or otherwise* explicitly brought to the attention of the other counsel." Seventh Cr. Standards For Prof'l Conduct, Rule No. 4. Here, not only were the insertion of the wages scales brought to the attention of Counsel but the fact that the changes would not appear in redline was also brought to the attention of Opposing Counsel.

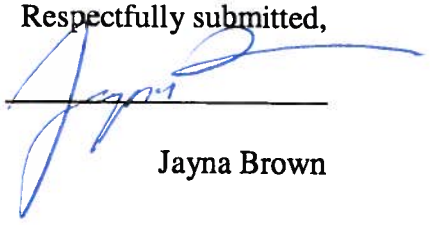
[12] For a complete analysis of Windward see Un. Br. at 37-40.

that the Respondent violated 8(a)(3) in refusing to execute the contract on grounds identical to the ones asserted by the CPA today. *Id.* The finding that the contract was unambiguous was based on the fact that the parties exchanged drafts that included the clear language for review and comment. *Id.* Here, the Respondents were presented with clear numbers and dates in charts (i.e. the wage scales) nearly eight times and had ample opportunity to read, review and object, but they did not. GC Ex 16-27. Therefore *Windward* is not distinguishable because the court found the contract was unambiguous, but directly comports with the instant case and requires the same finding of clarity, contract, and subsequent refusal to execute here. Accordingly, the ALJ erred in its application of *Windward* and if correctly applied should lead to the sustainment of the Unions exceptions.

CONCLUSION AND REMEDIES

For all of the reasons stated above, as well as in the Charging Party's Supporting Brief and Exceptions, the Respondents' Arguments and Brief in Opposition to the Union's and Counsel for the General Counsel's Exceptions should be dismissed outright. Therefore, the Union respectfully requests that its Exceptions to the ALJ's decision be sustained, and that the remedies requested in the Union's Exceptions and Counsel for the General Counsel be ordered in full.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned attorney, Jayna Brown, hereby certifies under penalty of perjury under the laws of the State of Illinois that on January 31, 2014, she caused to be served upon the person(s) listed below in the manner shown Charging Party's Teamsters Local 727's Reply Brief in Response to Respondent's Opposition to the Charging Party's and Counsel for the General Counsel's Exceptions, was served on the following parties via the method(s) indicated:

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